

Background

On December 4, 2007, a federal grand jury returned a one-count indictment against Mr. Herrera-Santos. *See Exhibit A, United States v. Juan Herrera-Santos*, CR 07-0764 SI, Indictment (hereinafter, “Indictment.”) The Indictment alleges a violation of Section 1326 of Title Eight of the United States Code. Specifically, the Indictment alleges that the defendant was “excluded, deported, and removed from the United States” on or about eight specific dates. *Id.* (alleging removals on October 3, 2001, September 7, 2002, April 9, 2003, April 22, 2005, July 1, 2005, November 30, 2005, November 28, 2006, and February 22, 2007).

The indictment further alleges that on or about September 17, 2007, Mr. Herrera-Santos was found in the Northern District of California without having first received the consent to reenter by the Attorney General and Secretary of Homeland Security. *Id.*

The indictment does not allege that Mr. Herrera-Santos previously suffered a conviction for three or more misdemeanors involving drugs or crimes against a person, or both. *See id.*; *see also Exhibit B*, 8 USC § 1326(b)(1). The indictment does not allege that the defendant suffered a conviction for felony. *Id.* The indictment fails to allege that Mr. Herrera-Santos suffered a conviction for an “aggravated felony.” *Id.*; *Exhibit B*, Section 1326(b)(2). Because the indictment fails to allege that the defendant had previously suffered any of the enumerated convictions in Section 1326, it necessarily also fails to allege that Mr. Herrera-Santos was removed from the United States *after* having sustained such an enumerated conviction. *Id.*; Section 1326(b).

The Indictment (shown as entry five on Mr. Herrera-Santos docket) bears a face sheet titled, “Defendant Information Relative to a Criminal Action - in U.S. District Court.” *Exhibit A*. That face sheet reports the following penalties for this indictment:

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1 PENALTY:

2 Maximum Prison Term of 20 Years;

3 Maximum Fine \$250,000

4 Maximum Term of Supervised Release of 3 Years;

5 Mandatory Special Assessment of \$100.

6 *Id.*

7 **Discussion**

8 The Indictment correctly charges the crime of illegal reentry, in violation of 8 USC
9 § 1326(a). The statutory maximum sentence for a violation of Section 1326(a) is two
10 years. *See Exhibit B*, Section 1326(a). The maximum term of supervised release for a
11 violation of Section 1326(a) – which carries a two year maximum sentence – is one year.
12 *See* 18 USC § 3559(a)(5) (defining Class E felony); *see also* 18 USC § 3583(b)(3)
13 (defining the statutory maximum term of supervised release for a Class E felony as one
14 year).

15 Mr. Herrera-Santos is prepared to be arraigned on the Section 1326(a) charge,
16 carrying the two year statutory maximum sentence and a one year term of supervised
17 release.

18 The problem with the Indictment, however, is that its face sheet purports that the
19 charged offense carries penalties of up to twenty years in custody, a maximum fine of
20 \$250,000, and a three year term of supervised release. *See Exhibit A*. Those penalties are
21 incorrect for the offense charged in the indictment, and Mr. Herrera-Santos objects to
22 arraignment on the wrong (and substantially higher) penalties.

23 Section 1326 has been subject to years of litigation, and for over a decade the
24 Ninth Circuit and Supreme Court have wavered on whether allegations and proof of prior
25 convictions are required to trigger the higher statutory maximum sentences found in
26 Section 1326(b). *See, e.g., United States v. Gonzalez-Medina*, 976 F.2d 570, 572 (9th Cir.
27 1992) (“Because sections 1326(a) and 1326(b)(1) (and, a fortiori, 1326(b)(2))) constitute
28 separate crimes – and not merely a single offense with different sentencing criteria – the
government was obligated to put on evidence of the defendants' prior felony convictions .

1 . . .”), *abrogated by Almendarez-Torres v. United States*, 553 U.S. 2241, 118 S. Ct. 1219
 2 (1998). This debate has continued into the post-*Apprendi* era. *See United States v.*
 3 *Pacheco-Zepeda*, 234 F.3d 411, 415 (9th Cir. 2000) (“Under *Almendarez-Torres*, the
 4 government was not required to include Pacheco-Zepeda's prior aggravated felony
 5 convictions in the indictment, submit them to a jury, or prove them beyond a reasonable
 6 doubt, and the district court properly considered such convictions in sentencing.”)

7 The latest word on this debate, however, came very recently from a decision
 8 written by the Honorable Richard Clifton in the Ninth Circuit. *See Exhibit C, United*
 9 *States v. Salazar-Lopez*, ___ F.3d ___, C.A. No. 06-50438, 2007 W 3085906 (9th Cir. Oct.
 10 24, 2007). In *Salazar-Lopez*, Judge Clifton squarely addressed the question of whether the
 11 dates of a previous felony conviction and of a previous removal must be alleged in the
 12 indictment, to trigger the higher statutory maximum sentences:

13 [W]e must resolve whether the dates of a previous felony conviction and of a
 14 previous removal from the United States, subsequent to that conviction, must be
 15 alleged in the indictment and proved to a jury for the defendant to be subject to an
 16 increased sentence under 8 U.S.C. § 1326(b).

17 *Id.* at 2007 W 3085906 , *1. The Court’s answer to this question was clear: “We answer
 18 that question in the affirmative.” *Id.* As the Court in *Salazar-Lopez* explained, “the
 19 temporal relationship between Salazar-Lopez’s removal and his previous conviction was
 20 a fact that increased the maximum sentence that he faced. As such, the date of the
 21 removal, or at least the fact that Salazar-Lopez had been removed *after* his conviction,
 22 should have been alleged in the indictment and proved to the jury. The failure to do so
 23 was an *Apprendi* error.” *Id.* at *2 (emphasis in original).

24 Under *Salazar-Lopez* (and *Apprendi*), the government’s failure to allege that Mr.
 25 Herrera-Santos has been removed *after* an enumerated conviction – and to specify the
 26 dates for both the removal and conviction – means that the grand jury has returned an
 27 indictment alleging an offense with a two-year statutory maximum sentence. *See Exhibit*
 28 *B*, Section 1326(a). This Court should therefore advise the defendant that the statutory
 maximum penalties for the offense charged in this indictment are:

1 Two years custody;
2 One year of supervised release;
3 \$250,000 fine;
4 \$100 special assessment.
5

6 The defense will be prepared to enter a plea to the charges in the indictment, after
7 being advised of these proper statutory maximum penalties.
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9 **Conclusion**

10 For the foregoing reasons, Mr. Herrera-Santos respectfully requests that he be
11 advised of the proper statutory maximum penalties for a violation of 8 USC § 1326(a),
12 when he is arraigned on December 10, 2007: two years of custody and one year of
13 supervised release.
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15 Dated: December 7, 2007

16 Respectfully submitted,
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18 BARRY J. PORTMAN
19 Federal Public Defender

20 /s

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22 Assistant Federal Public Defender
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